

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ABNER GILBERT)	
Claimant)	
VS.)	
)	Docket No. 1,034,287
WECKWORTH MANUFACTURING, INC.)	
Respondent)	
AND)	
)	
LIBERTY INSURANCE CORP.)	
Insurance Carrier)	

ORDER

The parties appealed the November 20, 2008, Award entered by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on February 20, 2009, in Wichita, Kansas.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Michael D. Streit of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board the parties agreed claimant sustained a 25 percent whole person impairment due to the injury he sustained on January 20, 2007. The parties also agreed that when duplicate tasks were eliminated, Dr. Munhall's ultimate opinion was that claimant had lost the ability to perform 60 percent of the work tasks that he had performed in the 15 years before his January 2007 accident and that Dr. Ciccarelli's ultimate opinion was that claimant had lost the ability to perform 43 percent of those same tasks.

ISSUES

Claimant injured his back on January 20, 2007, when he slipped on ice. In the November 20, 2008, Award, Judge Clark found claimant sustained a 51.5 percent task loss

and a 100 percent wage loss for a 75.75 percent permanent partial disability under K.S.A. 44-510e.

Respondent contends Judge Clark erred. In essence, respondent argues that the Board should give greater weight to the opinions of both Dr. John M. Ciccarelli, who operated on claimant's back, and respondent's vocational expert, Steve Benjamin, and find that claimant has a 43 percent task loss and an imputed 26.6 percent wage loss for a 34.80 percent permanent partial disability under K.S.A. 44-510e. Accordingly, respondent requests the Board to reduce claimant's permanent partial disability benefits.

Claimant also requests the Board to modify the Award. Claimant requests permanent total disability benefits as he contends he is essentially and realistically unemployable. He maintains the only work that he could possibly perform is sedentary but he is not qualified. What is more, he questions that he has the ability to sit to perform sedentary work.

The only issue before the Board on this appeal is the nature and extent of claimant's permanent disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant worked for respondent for approximately six years. Claimant explained: "I was lead for [respondent], I was in engineering, a laborer, I could read blueprints, tolerances, pretty much sewing, that's pretty much what they do down there, sewing machine and military contracts for the military."¹

As claimant was leaving work on Saturday, January 20, 2007, he slipped on ice in respondent's parking lot. After arriving home, his low back began feeling sore and stiff. The next morning, after claimant could hardly get out of bed, his wife took him to a hospital emergency room. Claimant was given pain medication and told to contact his employer on Monday about his accident.

After the emergency room visit, claimant next saw Dr. Dobyms. Dr. Dobyms referred claimant to Dr. Hsu, who performed surgery on claimant's low back. That surgery, which was done February 9, 2007, included an L4-5 discectomy and decompression of the L5 nerve root.

¹ R.H. Trans. at 21, 22.

Respondent's insurance carrier then referred claimant to Dr. John Ciccarelli, who also operated on claimant's low back. That surgery, which was performed on July 7, 2007, fused claimant's lumbar spine from L4 to S1.

Despite those surgeries, claimant's back complaints have not resolved. At his August 2008 regular hearing, claimant described his continuing low back pain as follows:

Chronic low back pain, just muscle tension, muscle spasms in my leg and in my back. Just a lot of pain.

. . . .

It's pretty constant. I have good days and bad days, but usually constantly I have had pain. It just depends. Like right now I am in pain, it's tolerable, but there's not a whole lot I can do about it.²

Claimant says he can walk about a block before he has to sit down and relax awhile. He also says his ability to sit is limited to about 15 minutes before he has to either walk around or lie down to relieve the pain. Claimant believes his standing is limited to approximately 10 to 15 minutes at a time. He testified his pain progressively increases through the day until it becomes intolerable, which then affects his ability to concentrate. Claimant describes his typical day, as follows:

I get up in the morning, take my kids to school, I come home. I need to rest for awhile. And then I will get up and try to do some of the house chores, what I am limited to do because I can't do what I want to do any more, so I have to be careful of what I do because I could hurt myself. And I get to hurting sometimes around noon and I will lay down for awhile and take some Tylenol.

That's about all I have for pain is Tylenol, Advil, they don't do a whole lot but they do take the edge off sometimes. Just walking, I try to walk a lot, but I can't walk very far at a time, but I try to do a lot of walking. I try to avoid stairs because they really kill me.³

On January 8, 2008, Dr. Ciccarelli released claimant from medical treatment with restrictions. The doctor recommended that claimant limit lifting to no greater than 30 to 40 pounds, avoid repetitive lifting, and avoid lifting below the waist.

After recuperating from his low back surgery, claimant did not return to work for respondent. From January 21 through June 17, 2008, claimant contacted more than 150

² *Id.* at 11.

³ *Id.* at 12, 13.

potential employers but he was unable to obtain a job. He did, however, have three interviews but he felt he was summarily dismissed after disclosing his work restrictions. Claimant believes there may be some jobs that he could perform but he would not truly know until he tried. Despite ongoing symptoms, claimant wants an opportunity to work.

During the 15 years before his accident, in addition to working for respondent claimant worked part-time as a groundskeeper for a child care center, worked as a picker/loader in a food warehouse, as a laborer for temporary employment agencies, and worked as a janitor for a manufacturing company. Claimant has a GED. What is more, he has never held a sedentary job.

This is not the first time that claimant has experienced low back problems. Claimant herniated a disc in his low back and in 1991 underwent a laminectomy and discectomy at L5-S1. Dr. Michael Estivo performed that surgery but the doctor did not testify in this claim.

Dr. Michael H. Munhall

Dr. Munhall, who is board-certified in pain management, holistic medicine and physical medicine and rehabilitation, examined claimant in February 2008 at his attorney's request. The doctor determined claimant had reached maximum medical improvement and rated claimant under the AMA *Guides*⁴ as having a 25 percent whole person functional impairment due to his January 2007 accident and the resulting discectomy and fusion. Dr. Munhall did not apportion any of the 25 percent rating to claimant's earlier back injury as claimant's new injury was at the disc space above the old.

The doctor suggested warm water stretching and conditioning and a TENS unit for claimant's chronic low back pain. Dr. Munhall also recommended that claimant perform sedentary work only and limit his lifting and carrying to an occasional basis and to no greater than 10 pounds from a sedentary work station. Also, the doctor restricted claimant from static or repetitive trunk rotation, bending, squatting, stooping, and kneeling, and from aboveground work, stairs, and ladder climbing.

Dr. Munhall felt claimant's intolerance to sitting may preclude his ability to perform sedentary work. And if claimant is unable to tolerate sedentary employment because of his inability to sit, Dr. Munhall stated claimant would not be employable. Nonetheless, the doctor reviewed a list of former work tasks that claimant performed in the 15 years before his January 2007 accident. The doctor testified that claimant had lost the ability to perform 70 of the 94 tasks, or 74 percent. As indicated above, at oral argument before the Board

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

the parties agreed that when duplicate tasks were eliminated from the task list Dr. Munhall's restrictions prohibited claimant from performing 18, or 60 percent, of the remaining 30 tasks.

Dr. John M. Ciccarelli

As indicated above, in July 2007 Dr. Ciccarelli fused claimant's lower lumbar spine. And in January 2008 the doctor determined claimant had reached maximum medical recovery. At that time claimant continued to use a muscle relaxant intermittently but he was essentially off his pain medications. According to the doctor, claimant stated he was experiencing no leg pain and that he was pleased with the result of his surgery. Nonetheless, Dr. Ciccarelli agreed with Dr. Munhall that claimant has a 25 percent whole person functional impairment.

Dr. Ciccarelli concluded claimant retained the ability to work. Initially the doctor noted that claimant should avoid repetitive bending and lifting below the waist on a frequent or constant basis. But when asked about claimant's ability to perform the tasks in the list prepared by Mr. Hardin, the doctor indicated his restrictions were general guidelines and that he would not restrict claimant's activities based upon those physical motions alone. Accordingly, the doctor estimated claimant had lost the ability to perform 28 of the 94 tasks, or approximately 30 percent. Again, as indicated above, at oral argument before the Board the parties agreed that when duplicate tasks were eliminated from the task list Dr. Ciccarelli prohibited claimant from performing 13, or 43 percent, of the 30 remaining tasks.

Nature and extent of disability

There is no question that claimant's January 2007 accident and his two resulting back surgeries have adversely affected his ability to work. Claimant, who took several years to obtain his GED, primarily performed manual labor before his January 2007 back injury. Claimant's labor market expert, Jerry D. Hardin, concluded claimant was unemployable. Mr. Hardin testified, in part:

When [claimant] was here in my office, he had to change positions, sit and stand during the interview, and he is not educated for sedentary types of positions, he's a laborer type of person. He's had very little education, did not finish high school. He did get a GED but that was the total amount of his formal education and training. Sedentary positions generally are more highly educated people and he can't even qualify for the sedentary positions because of his lack of tolerance of even sitting, so in my opinion, there are just no jobs or companies that I know of that would be interested in hiring someone or working with someone that can't even qualify for a sedentary position.⁵

⁵ Hardin Depo. at 15, 16.

What is more, claimant's vocational expert, Karen Terrill, added:

[Claimant] has a high school education, however, it was achieved through six years worth of high school, and that was -- he went through six years of school in order to eventually obtain a GED. When you look at Dr. Munhall's restrictions, he cannot do any of his past relevant work history, he has no specialized training that would allow him to work in a sedentary capacity of work, which when you look at Dr. Munhall's restrictions, that is where he is placed is sedentary, and this is especially true in view of his educational background, his reported learning difficulties, in other words, the lower physical level of work, the sedentary capacity of work, the higher cognitive abilities you must have in order to be successful in engaging in that type of work. . . . Although he's had supervisor activities, he was a working supervisor, and he did this for less than six months, supervisory skills are something that you learn by doing or learn through an educational endeavor, and his was on-the-job, and he wasn't engaged in it long enough to learn the skills associated with being a supervisor. . . . He can't do seated positions because he has to alternate sitting and standing. If he was able to do some type of a seated position and could alternate sitting and standing, he can only work part time because of the dictates of his pain, plus if he was able to do sedentary work, he simply does not have the cognitive wherewithal in order to perform the sedentary capacity of work even at an unskilled base of work. . . .⁶

In short, Ms. Terrill also concluded claimant was unable to engage in any type of substantial and gainful employment.⁷

On the other hand, respondent's vocational expert, Steve Benjamin, evaluated claimant and concluded that under Dr. Munhall's restrictions claimant could perform such jobs as a cafeteria cashier, parking lot attendant, sewing machine operator, telephone solicitor and earn up to \$281 per week. Likewise, under Dr. Ciccarelli's restrictions, Mr. Benjamin concluded claimant could perform such jobs as a hand packager, manufacturing helper, cleaner/janitor, security guard, or small parts bench assembler and earn \$301 per week. Nevertheless, Mr. Benjamin acknowledged that in the event claimant was unable to tolerate sedentary work, claimant would be essentially and realistically unemployable.

The Workers Compensation Act provides that permanent total disability exists when a worker has been rendered completely and permanently incapable of engaging in any type

⁶ Terrill Depo. at 13-16.

⁷ *Id.* at 16.

of substantial and gainful employment.⁸ And in *Wardlow*,⁹ the Kansas Court of Appeals held that being *essentially and realistically unemployable* was the equivalent of being permanently and totally disabled.

Considering the whole record, the Board concludes that claimant has been rendered unable to perform any work other than, perhaps, that work which falls into the sedentary category. But it is more probably true than not that claimant is unable to perform sedentary work due to his training, education, and transferable job skills. In addition, the Board finds claimant's difficulties sitting and standing likewise render it improbable that claimant retains the ability to perform sedentary work. In short, the Board finds that claimant at this time is unable to return to the open labor market and perform substantial, gainful employment. In the vernacular of *Wardlow*, claimant is essentially and realistically unemployable. Consequently, the Award should be modified to grant claimant permanent total disability benefits.

Nevertheless, claimant retains a strong desire to return to work. Should respondent provide claimant with vocational rehabilitation benefits that successfully return claimant to the workforce, or should claimant find employment on his own, the parties may seek review and modification under K.S.A. 44-528.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the November 20, 2008, Award entered by Judge Clark.

Abner Gilbert is granted compensation from Weckworth Manufacturing, Inc., and its insurance carrier for a January 20, 2007, accident and resulting disability. Based upon an average weekly wage of \$410.48, Mr. Gilbert is entitled to receive 44.714 weeks of temporary total disability benefits at \$273.67¹¹ per week, or \$12,236.88, plus 412.04 weeks

⁸ K.S.A. 44-510c(a)(2).

⁹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

¹⁰ K.S.A. 2008 Supp. 44-555c(k).

¹¹ The compensation rate used to calculate claimant's award in the November 20, 2008, Award, was \$273.93. But the correct compensation rate for claimant's \$410.48 average weekly wage is \$273.67.

of permanent total disability benefits at \$273.67 per week, or \$112,763.12, for a permanent total disability and a total award not to exceed \$125,000.

As of March 31, 2009, Mr. Gilbert is entitled to receive 44.714 weeks of temporary total disability benefits at \$273.67 per week, or \$12,236.88, plus 69.71 weeks of permanent total disability benefits at \$273.67 per week, or \$19,077.54, for a total due and owing of \$31,314.42, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$93,685.58 shall be paid at \$273.67 per week until paid or until further order of the director.

The Board notes that the Judge did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the Judge for approval.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge